U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: SEP 0 6 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] describes itself as a manufacturer and distributor of oral and personal care products. It seeks to permanently employ the beneficiary in the United States as a credit analyst. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because: (1) the labor certification does not require a member of the professions holding an advanced degree; and (2) the beneficiary of the petition did not satisfy the minimum educational requirements of the requested visa classification.

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[1] The name of the entity listed as the employer on the labor certification and the petitioner on the Form I-140, Alien Petition for Alien Worker, is Dr. The record indicates that there has been a change in ownership leading to the original employer's acquisition by Dr. a limited liability company (LLC). The petitioner asserts that the assets and liabilities of Dr. were transferred to Dr. and that the business of the original employer remains unchanged under the new entity. This transfer of assets and obligations to the purported successor-in-interest has not been documented in the record. The petitioner is a different entity from the employer listed on the labor certification and has a different federal employer tax identification number (FEIN). A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. In any future filings, the petitioner must show that these three conditions have been satisfied. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

On appeal, the petitioner states that the director erred in concluding that the labor certification did not require a minimum of an advanced degree for the offered position, and contends that the beneficiary satisfies the minimum educational requirements of the requested visa classification, because he possesses a U.S. Bachelor's degree, or the foreign equivalent, based on a combination of foreign academic degrees, followed by five years of employment experience.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[2] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[4]

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the

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[2] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[3] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS

cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Master's.
H.4-B. Major Field of Study: Accounting.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study acceptable?: Yes.
H.7-A. Alternate field of study: Entrepreneurial Management.
H.8. Alternate combination of education and experience acceptable? Yes.
H.8-A. Alternate level of education required: Other
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: Bachelor's Degree, *or any suitable combo. of education, training or exp.* (Emphasis added).
H.8-C. If applicable, indicate the number of years of experience acceptable in question 8.: 5.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Requires a Master's Degree in Accounting and 1 year of experience. In lieu of, will accept a Bachelor's Degree in Accounting and combination of academic credit that is equivalent thereof and 5 years of experience, *or any suitable combination of education, training or experience thereof.* Experience can be progressive. No less than a Bachelor's Degree or combination of academics and 5 years of experience is acceptable. (Emphasis added).

As set forth in the labor certification in this case, an individual can qualify for the offered position based on a Master's degree (or foreign equivalent degree) in Accounting or the related field of Entrepreneurial Management. Alternately, an individual can qualify based on "other" education, less than a four-year awarded Bachelor's degree ("credit" equal to) a Bachelor's Degree, *or any suitable combination of education, training or experience*, followed by five years of experience. *See* Questions H.8-B & C, H-14. The specific response to question H.8-B clarifies that "*or any suitable combination of education, training or experience*" is the alternate to a Bachelor's degree requirement, rather than to the five year experience requirement, as counsel contends, and which is addressed separately at question H.8-C. Moreover, question H.14, specifies that an individual can qualify through the alternate Bachelor's degree requirement by demonstrating a Bachelor's degree equivalency through a combination of academic credits, which is less than having an actual Bachelor's degree. Therefore, the labor certification does not require that a single Bachelor's degree (or foreign degree equivalent), followed by five years of progressive experience, be the minimum

education requirement to establish the advanced degree equivalency required for the visa classification sought. This conflicts with 8 C.F.R. § 204.5(k)(2), which specifically provides that a "United States baccalaureate *degree* or a foreign equivalent *degree* followed by at least five years of progressive experience in the specialty *shall be considered the equivalent of a master's degree.*" (Emphasis added). Additionally, question H.14 states that the five years of experience "can be" progressive. However, the regulation at 8 C.F.R. § 204.5(k)(2) requires that a Bachelor's degree or foreign equivalent be followed by *at least* five years of progressive experience. Therefore, both the primary and alternate education and experience requirements fail to consistently state minimum requirements to qualify the position as an advanced degree professional position.

Where the labor certification allows for a Bachelor's degree (followed by five years of progressive experience) for qualification as an advanced degree professional, the degree must be a single U.S. bachelor's (or foreign equivalent) degree. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the legacy INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990) and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005

(D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold at least a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[5] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional holding an advanced degree must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree, in addition to the five plus years of progressive experience in the specialty. Here, as noted, the labor certification's alternate education and experience requirements do not require an individual to possess a minimum of a Bachelor's degree in combination with the requisite five years of progressive experience to qualify for visa classification as a member of the professions holding an advanced degree, but instead, allows for "other" combined education and experience which "can be" progressive.

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[5] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

Therefore, since an individual can qualify for the offered position with a degree less than a baccalaureate (followed by five years of progressive experience in the specialty), the petition does not qualify for advanced degree professional classification.

However, even if the labor certification required a minimum of an advanced degree for the offered position to qualify for the visa classification sought here, which, as discussed above, it does not, the petition must still be denied because the record fails to establish that the beneficiary satisfies the minimum educational requirements for classification as a member of the professions holding an advanced degree.

As discussed, the plain meaning of the Act and the regulations is that the beneficiary of an advanced degree professional petition must possess, at a minimum, a degree from a college or university that is a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the petitioner relies on the beneficiary's Bachelor of Commerce degree obtained in 2002 from the India, in combination with his final examination certification and award of Association Membership with the in in 2005, as being equivalent to a U.S. bachelor's degree.

The record contains an evaluation of the beneficiary's educational credentials prepared by for on September 6, 2011, which concludes that the beneficiary's Bachelor of Commerce degree from the along with the Statement of Marks listing the subjects examined in the third year with the corresponding marks, are equivalent to three years of credit in business and accounting from an accredited U.S. university.[6] Mr. further states that these documents, in conjunction with the beneficiary's certificate of membership with the and copies of the Foundation, Intermediate, and Final Examination Certificates and the Statements of Marks, are the equivalent to a bachelor's degree in accounting from an accredited college or university in the United States.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to

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[6] USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[7] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[8]

According to EDGE, the beneficiary's Bachelor of Commerce degree from India represents attainment of a level of education comparable to two to three years of study in the United States, but is not the foreign equivalent of a U.S. Bachelor's degree. Further, it indicates that the final exam certification and award of Association Membership with the represents attainment of a level of education comparable to a Bachelor's degree in the United States.

However, as is explained above, for classification as an advanced degree professional, the beneficiary must possess a foreign *degree* from a college or university that is equivalent to a U.S. bachelor's degree. While EDGE concludes that the beneficiary's final examination certification and Association Membership award is "comparable to" a U.S. bachelor's degree, it is not a degree from a college or university. The is not an institution of higher education that can confer a degree, but instead, is a "statutory body" established "for the regulation of the profession of in India."[9] *See http://icai.org/new_post.html?post_id=165&c_id=195* (last

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[7] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[8] In *Confluence International, Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification required a degree and did not allow for the combination of education and experience.

[9] *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *11 (D. Ore. Nov. 30, 2006) (finding USCIS was justified in concluding that Institute of Chartered Accountants of India

accessed August 27, 2013). Therefore, although the beneficiary possesses the "equivalent" of a bachelor's degree, he does not possess a "foreign equivalent degree" within the meaning of 8 C.F.R. § 204.5(k)(2) as required for classification as a member of the professions holding an advanced degree.[10]

Counsel asserts on appeal that there is no requirement of a singular degree for the minimum requirement of a Bachelor's degree for classification as a member of the professions holding an advanced degree, and contends that the Bachelor's degree equivalency can be satisfied by a combination of academics, such as that possessed by the beneficiary. Counsel refers to a decision issued by the AAO on February 2, 2010, which concluded that based on EDGE's confirmation that the beneficiary's ICAI final examination certification and Association Membership award represents attainment of a level of education comparable to a U.S. Bachelor's degree, the beneficiary held the equivalent of a U.S. bachelor's degree and met the educational requirements set forth in the labor certification for the offered position seeking classification as a member of the professions.[11] However, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Thus, the cited decision is not binding on the AAO. Furthermore, the decision referenced was reopened by the AAO on its own motion, and in a non-precedent decision, published November 23, 2011, the AAO specifically withdrew the portion of the prior decision, which had concluded that the

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membership was not a college or university "degree" for purposes of classification as a member of the professions holding an advanced degree).

[10] The petitioner's reliance on *Snapnames.com* is misplaced. The labor certification application's job requirements in that case specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The beneficiary had a three-year degree and membership in the ICAI. USCIS had concluded that the alien did not qualify for classification as a professional or a member of the professions holding an advanced degree (due to the specific job requirements on the labor certification), which the district court upheld. The court, however, reversed USCIS on its decision to deny the petition under the skilled worker classification as well. In reaching its conclusions, the federal district court in *Snapnames.com, Inc.* determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, such as the instant case, where the alien is statutorily required to hold a bachelor's degree, the USCIS properly concluded that a single U.S. Bachelor's degree or its foreign equivalent is required. *Snapnames.com, Inc.* at *17, 19.

[11] Regardless, the petition in that case was dismissed because the petitioner did not establish that the ETA Form 9089 required a professional holding an advanced degree, or its foreign equivalent, as required for classification as a member of the professions holding an advanced degree.

beneficiary in that case held the foreign equivalent of a U.S. Bachelor's degree in order to qualify as a member of the professions. *See* http://www.uscis.gov/err/B5%20-%20Members%20of%20the%20Professions%20holding%20Advanced%20Degrees%20or%20Aliens%20of%20Exceptional%20Ability/Decisions_Issued_in_2011/Nov232011_02B5203.pdf (last accessed August 27, 2013).

Accordingly, as set forth above, to qualify as a professional, or member of the professions, the beneficiary is required to have a Bachelor's degree from a college or university. While a combination of education might be accepted in the skilled worker context depending on the terms of the labor certification and a beneficiary's qualifications, there is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different preference classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In summary, the offered position does not require an advanced degree, as both the primary and alternate education and experience requirements fail to state requirements for an advance degree professional. Furthermore, the beneficiary does not possess, at a minimum, a degree from a college or university that is a U.S. baccalaureate degree or a foreign equivalent degree, as required for visa classification as a member of the professions holding an advanced degree. Therefore, the petition cannot be approved under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Thus, beyond the decision of the director, the petitioner has also not established that the beneficiary has the requisite employment experience to qualify for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the August 21, 2011 priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

Based on the primary requirements, the labor certification in this case requires a Master's degree and a minimum of twelve months of work experience in the offered position to qualify for the proffered

position. Alternatively, the beneficiary may qualify through a Bachelor's degree and five years of experience. If relying on the alternative requirements for the offered position, the beneficiary must show five years of progressive experience. The beneficiary claims on the ETA Form 9089 to have gained this experience in India while employed in a full-time capacity as a credit analyst with: from July 12, 2006 to February 7, 2007; Ms. from May 16, 2005 to June 30, 2006; Ms. from May 1, 2002 to April 30, 2005; and Ms. from August 2, 2000 to April 1, 2002.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). Here, the record contains letters from only three of the beneficiary's former employers, namely However, the beneficiary's employment experience with these three employers total less than the five years of employment experience required by the terms of the labor certification for the proffered position.

The record contains a letter from the petitioner, dated September 5, 2012, certifying the beneficiary's employment with the organization since October 1, 2007 as an accountant. However, it is unclear whether this experience can be used to qualify the beneficiary for the offered position. Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position. *See* 20 C.F.R. § 656.17. Specifically, the petitioner indicates "no" in response to question J.19, which inquires whether the beneficiary possesses the alternate combination of education and experience, if permitted by the terms of the labor certification. In response to question J.20, the petitioner indicated "not applicable" to the question whether the beneficiary possesses experience in an alternate occupation, as such experience is not permitted in question H.10. The petitioner responded "no" to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable, as defined in 20 C.F.R. § 656.17, and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1 that the beneficiary was employed as a credit analyst with the petitioner beginning April 1, 2011, and in question K.2., states that his position with the petitioner was as an accountant from October 1, 2007 until March 30, 2011. The job duties of both positions indicated are the same or similar to those of the position offered as a credit analyst. Therefore, it appears that the experience gained with the petitioner was either in the position offered or is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was either in the position offered or a position substantially comparable, it does not appear the experience may be

used to qualify the beneficiary for the proffered position. Thus, the evidence in the record does not establish that the beneficiary possessed either the required education or the required experience set forth on the labor certification by the priority date.

Beyond the decision of the director, the record also does fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage.

Here, the petitioner has submitted its 2010 corporate tax return and a request for an extension to file its 2011 tax return, as well as the beneficiary's 2011 IRS W-2 Form and several wage statements from 2012. The 2010 return and 2011 W-2 Form do not cover the June 8, 2012 priority date as required. Moreover, the 2012 wage statements only establish payment of a portion of the proffered wage. Accordingly, the record does not establish the petitioner's ability to pay the proffered wage from the priority date onwards. At the time of the filing of the labor certification and the subsequent appeal to the AAO, the petitioner's 2012 annual report, audited financial return, or tax return, which would cover the priority date in this case, were not yet available. In any future filings, the petitioner must submit one of the three referenced records, in compliance with 8 C.F.R. § 204.5(g)(2), for each year from the 2012 priority date onward.

Further, according to USCIS records, the petitioner has filed numerous Form I-140 and nonimmigrant petitions (Form I-129, Petition for a Nonimmigrant Worker) on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other

petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the record before the AAO does not establish the petitioner's ability to pay the proffered wage to the beneficiary as required. This issue must be resolved in any future filings.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.